

**STATE OF NEW MEXICO  
BEFORE THE WATER QUALITY CONTROL COMMISSION**

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**IN THE MATTER OF PROPOSED** )  
**RULEMAKING RULES FOR THE** )  
**COMMISSION, 20.1.6 NMAC** )  
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**No. 16-03 (R)**



**ORDER AND STATEMENT OF REASONS**

THIS MATTER came before the Water Quality Control Commission (Commission) under a Petition to Adopt Rulemaking Procedures and Request for Hearing, filed by the New Mexico Environment Department (Department) on July 25, 2016. On October 11, 2016, at a public hearing before the Commission, the Department and the New Mexico Mining Association (Association) presented technical testimony and entered exhibits into the record. The Commission deliberated on both October 11, 2016 and again on November 15, 2016, at which time it voted to adopt the proposed rule (Rule) with certain changes as described below.

**I. STATEMENT OF REASONS**

1. On July 25, 2016, the Department filed a petition with the Commission proposing rulemaking rules for the Commission and requesting a public hearing in this matter. Exhibit 2 to the petition contained the proposed language of the Rule. See Petition, Exhibit 2.
2. At a meeting conducted in compliance with the Open Meetings Act and other applicable requirements, the Commission granted the Department's request for a hearing and scheduled the hearing for October 11, 2016. See Scheduling Order, WQCC 16-03(R).
3. Public notice of the hearing was published in the Albuquerque Journal on August 25, 2016 and in the New Mexico Register on August 31, 2016. The notice stated that the

Commission may deliberate and reach a decision on the proposed rule at the conclusion of the hearing, or may convene at a later date to consider action on the proposal. See NMED Notice of Intent, Exhibit 5.

4. The Department filed a Notice of Intent (Notice) to Present Technical Testimony on September 21, 2016, in accordance with the Guidelines for Water Quality Control Commission Regulation Hearings (Guidelines).

5. A Notice of Intent was also filed by the New Mexico Mining Association (Association) on September 21, 2016.

6. A hearing in this matter was held in Santa Fe, New Mexico on October 11, 2016, at which a reasonable opportunity for all persons to be heard was provided. The hearing was transcribed by Kathy Townsend Court Reporters, and a transcript was entered into the record. See Transcript of Proceedings, Volume 1 (Tr.).

7. Mr. Jeffrey Holappa, the Department's Hearing Officer, provided written and oral testimony at the hearing in support of the Rule. See Department Notice, Exhibit 2, and Tr. pp. 15-44 and 100-115.

8. Mr. Michael Bowen and Mr. Anthony J. Trujillo provided testimony during the hearing in support of the changes to the Rule proposed by the Association. See Tr. pp. 44-94.

9. The changes proposed by the Association are contained in Exhibit A of its Notice in ten numbered paragraphs. See Association Notice, Exhibit A.

10. On November 15, 2016, the Commission met in Santa Fe, New Mexico in Room 309 of the State Capitol Building and continued deliberations on this matter. The meeting was transcribed by Kathy Townsend Court Reporters. See Transcript of Proceedings, Volume 2 (Tr. V2.).

11. In paragraph one of its Notice, the Association proposed to add language to Section 20.1.6.7(P) NMAC to identify written pleadings as part of the record proper. See Association Notice, Exhibit A, paragraph 1.

12. The Commission finds that adding the language “all written pleadings, including motions and responsive pleadings, and orders” will enhance the clarity of Section 7(P) of the Rule and therefore adopts its inclusion. See Tr. p. 143 ln. 9 – p. 145 ln. 6.

13. Paragraph two of the Association’s Notice proposed additions to the language of Section 20.1.6.100(C)(2) NMAC specifying that a hearing officer may recuse themselves, clarifying that a hearing officer may obtain advice from the Commission's counsel, and specifying that other parties may file a motion for disqualification of a hearing officer. See Association Notice, Exhibit A, paragraph 2.

14. The Commission finds that the changes proposed in paragraph two of the Association’s Notice are not necessary, given the inherent right of a person appointed by the Commission as a hearing officer to recuse themselves, that the Rule already allows the filing of motions including a motion for disqualification, and the possibility that consultation between the Commission's counsel and a hearing officer regarding disqualification could present a conflict of interest for the Commission's counsel. See Petition, Exhibit 2, p. 6, ln. 22-40; Tr. p. 101 ln. 22 - p. 103 ln. 8; and Tr. p. 145 ln. 7 – p. 147 ln. 13.

15. Paragraph three of the Association’s Notice proposed changes specifying that the time period when *ex parte* communications are prohibited is from "the commission's determination to hold a public hearing on a petition and before the issuance of the commission's written decision." See Association Notice, Exhibit A, paragraph 3.

16. The Commission finds that modification of Section 20.1.6.103 is necessary to improve the Section's clarity and therefore amends Section 20.1.6.103 by striking the phrase "the initiation and before the conclusion of a proceeding" and replacing it with "the commission's determination to hold a public hearing on a petition and before the issuance of the commission's written decision" See Petition, Exhibit 2, p. 3, ln. 52-55; Tr. p. 164 ln. 1-14; and Tr. p. 147 ln. 14 – p. 164 ln. 14.

17. Paragraph four of the Association's Notice proposed changes to Section 104 of the Rule to allow the commission administrator to waive the requirement to provide 15 copies of each filed document under certain circumstances. See Association Notice, Exhibit A, paragraph 4.

18. The Commission finds that to promote flexibility, Section 20.1.6.104(1) should be modified by striking "and 15 copies" and adding "along with up to 15 copies, provided that the commission administrator may waive the requirement to provide up to 15 copies if an electronic copy of the original is provided in a format acceptable for distribution to the commission members." See Tr. p. 105 ln. 2 – p.106 ln. 3; Tr. p. 164 ln. 15 – p. 174 ln. 15; and Tr. p. 179 ln. 5 – p. 180 ln. 25.

19. Paragraphs five through eight of the Association's Notice proposed changes to Sections 200 and 202 of the Rule which would allow the Commission to designate a rulemaking as either "simple" or "complex" and include additional procedures to be followed for a "complex" rulemaking. See Association Notice, Exhibit A, paragraphs 5-8.

20. The Commission finds that the changes proposed in paragraphs five through eight of the Association's Notice are unnecessary because it is important for the Commission to maintain a degree of flexibility in its procedures, and the matters addressed by these proposed changes are

best handled on a case-by-case basis, such as through the entry of a procedural order. See Tr. p. 106 ln. 9-25.

21. Paragraph nine of the Association's Notice proposed changes to Section 302 of the Rule, specifying that the requirements of Subsection 302(A) would only apply to exhibits not filed and served to the Commission and other parties before the hearing. See Association Notice, paragraph 9.

22. The Commission finds that the changes proposed in paragraph nine of the Association's Notice provide additional clarity, and should be added to the language of the Rule. See Tr. p. 63 ln. 6-12; Tr. p. 108 ln. 1-9; Tr. V2. p. 222 ln. 3 – p. 225 ln. 14.

23. Paragraph 10 of the Association's Notice proposed to include "revised proposed rule language" in Section 304 of the Rule to the list of post-hearing submittals for which the hearing officer may allow the record to remain open. See Association Notice, paragraph 10.

24. The Commission finds that the changes proposed in paragraph 10 of the Association's Notice provide additional clarity, and should be added to the language of the Rule. See Tr. p. 108 ln. 15 – p. 109 ln. 16; and Tr. V2. p. 225 ln. 15 – p. 226 ln. 14.

25. During the hearing, the Commission heard public comment submitted by the San Juan Water Commission (San Juan) and by Los Alamos National Security (LANS), proposing the addition of certain language to the proposed rule. See Tr. pp. 95-98.

26. San Juan Water Commission proposed the addition of the phrase "or opposing" to Section 305 of the Rule, describing the contents of a hearing officer's report. See Letter of October 5, 2016 from San Juan Water Commission to NM WQCC, received October 11, 2016.

27. The Commission finds that the language proposed by San Juan Water Commission adds value to Section 305 by clarifying that a hearing officer's report must include discussion of

evidence both supporting and opposing the hearing officer's proposal. See Tr. p. 125 ln. 14 – p. 129.

28. LANS proposed changes to Section 307 of the Rule, specifying that a hearing officer shall rule on motions "expeditiously" and narrowing the timeframe for responses and replies to motions. See LANS Comments for the Public Record, filed October 7, 2016.

29. The Commission finds that the changes proposed by LANS are unnecessary, because it is commonly understood that hearing officers shall rule on motions expeditiously, and the time frames for motion practice in the Rule should be consistent with time frames in the Commission's adjudicatory rules, as well as other adjudicatory settings, such as the district courts. See Tr. p. 136 ln. 10 – p. 141.

30. The Department's proposal at Section 200(C) included replacing "within 90 days" as found in the Guidelines with "at least 15 days and no later than 60" days and striking the last sentence of the Section— "[t]he denial of a petition shall not be subject to judicial review." See Petition, Exhibit 2 p. 4 ln. 43.

31. The Commission finds that maintaining the existing hearing schedule affords the public the greatest opportunity for both notice and participation and therefore determined to replace the Department's proposed language— "at least 15 days and no later than 60"— with "no later than 90" and adopted the Department's proposal to strike "[t]he denial of a petition shall not be subject to judicial review." Tr. V2. p. 249 ln. 11 – p. 253 ln. 2.

32. The Department's proposal at Section 201(A) requires publication of notices in a newspaper of statewide circulation, rather than publication "in the area affected by the proposed regulation." See Petition, Exhibit 2 p. 4 ln. 54.

33. The Commission finds that rural communities often do not subscribe to or review newspapers of statewide circulation, consequently, the publication of notices in only statewide newspapers has the potential to exclude rural communities and therefore the Commission determined to require that notices for a proposed rule of general application to the state, shall be made in at least one newspaper of general circulation in the state, whereas notices for proposed rules that are confined in effect to a specific geographic area shall also be published in the newspaper(s) of general circulation in the area affected. See Tr. p. 22 ln. 5 – p. 26 ln. 1; Tr. V2. p. 227 ln. 1 – p. 248 ln. 24.

34. The Department's proposal at Section 205 included a proposal to allow hearings on proposed regulatory changes of local application to be held within the area affected by the proposal. Petition, Exhibit 2 p. 5 ln. 53.

35. The Commission finds that the practice of holding hearings on proposals that are of local rather than statewide concern in the affected communities provides a great benefit to both the affected communities and the Commission. The Commission supports the concept but determined to adjust the language to provide greater clarity. See Tr. p. 41 ln. 18 – p. 44 ln. 5.

36. The Commission has the authority to adopt the proposed rule pursuant to the Water Quality Act (the Act) NMSA 1978, §§ 74-6-4 through 74-6-6.

37. In considering the proposed rule, the Commission is required by Section 74-6-4(E) of the Act to give weight it deems appropriate to all facts and circumstances, including but not limited to (1) character and degree of injury to or interference with health, welfare, environment, and property; (2) the public interest, including the social, and economic value of the sources of water contaminants; (3) technical practicability and economic reasonableness of reducing or eliminating water contaminants from the sources involved and previous experience with



equipment and methods available to control the water contaminants involved; (4) successive uses, including but not limited to domestic, commercial, industrial, pastoral, agricultural, wildlife and recreational uses; (5) feasibility of a user or a subsequent user treating the water before a subsequent use; (6) property rights and accustomed uses; and (7) federal water quality requirements.

38. The Commission has previously conducted rulemakings utilizing the Guidelines since their adoption on November 10, 1992.

39. The Guidelines are more than 20 years old, and make no provision for modern methods of communication or document service, such as email or teleconferencing.

40. The Guidelines do not have the force of law that the Rule will have as part of the New Mexico Administrative Code.

41. The Guidelines do not address certain procedural issues that have arisen in recent rulemakings, particularly in relation to motion practice and the filing and service of documents.

42. The Rule improves upon the Guidelines by adding language from the Commission's adjudicatory rules, as well as the rulemaking procedures for the Environmental Improvement Board.

43. The Commission finds that the Rule is consistent with the public notice and hearing location requirements of the WQA.

44. The Commission finds that the Rule will reduce confusion and uncertainty on the part of petitioners and other parties to rulemakings before the Commission by providing more specific guidance regarding the format, filing, and service of documents, as well as the timeframes for responses and replies during motion practice.



45. The Commission finds that the Rule as proposed should be adopted with the following changes:

a. The addition of the word "the" after the word "including" in Section 200(B) on line 37, page 4 of NMED Exhibit 2 of the Petition, such that the sentence reads "A copy of the entire rule, including the proposed regulatory change .... "

b. The word "proscribe" should be changed to "prescribe" in Section 205 on line 55, page 5 of NMED Exhibit 2 of the Petition, such that the sentence reads " ... at other places the commission may prescribe." Tr. p. 31 ln. 8 – 16;

c. The addition of the phrase "other than a document filed and served before the hearing" to Section 302(A) of the Rule after the word "hearing" on page 7, line 33 of NMED Exhibit 2 of the Petition, such that the sentence reads "Any person offering an exhibit at hearing, other than a document filed and served before the hearing .... " Tr. p. 108 ln. 1-9; Tr. p. 63 ln. 6-12; Tr. V2. p. 222 ln. 3 – p. 225 ln. 14.

d. The addition of the phrase "revised proposed rule language" to Section 304 of the Rule after the word "arguments" on page 7, line 52 of NMED Exhibit 2 of the Petition, such that the sentence reads " ... for written submission of additional evidence, comments and requirements, revised proposed rule language, and proposed statements of reasons." Tr. V2. p. 225 ln. 15 – p. 226 ln. 14.

e. Replace the second sentence of Section 205 with the following language: "The commission may hold hearings on proposed regulatory changes that are not of statewide application within the area substantially affected by the proposal."

f. In Section 201(A), after the words "at least 60 days prior to the hearing. Public notice" and before the words "publication in the New Mexico Register . . ." strike

the phrase “shall include publication in at least one newspaper of general circulation in the state,” and replace it with the phrase: “for a proposed rule of general application to the state, shall be made in at least one newspaper of general circulation in the state. For a proposed rule that is confined in its effect to a specific geographic area, the public notice shall also be published in the newspaper(s) of general circulation in the area affected. In all instances, public notices shall also include”. Tr. V2. p. 227 ln. 1 – p. 248 ln. 24.

g. Replace the Department’s proposed language in Section 200(C)—“at least 15 days and no later than 60”— with “no later than 90” and adopted the Department’s proposal to strike “[t]he denial of a petition shall not be subject to judicial review.” Tr. V2. p. 250 ln. 7 – p. 253 ln. 2.

h. Insert, in Section 305 the language “or opposing” after the phrase “the evidence supporting” and before the phrase “those proposals.” Tr. p. 125 ln. 14 - p. 129.

i. Insert in Section 20.1.6.7(P) a new paragraph (11), which will read, “all written pleadings, including motions and responsive pleadings, and orders.” Tr. p. 143 ln. 9 – p. 145 ln. 6.

j. Modify Section 20.1.6.103 by striking the phrase “the initiation and before the conclusion of a proceeding” and replacing it with “the commission’s determination to hold a public hearing on a petition and before the issuance of the commission’s written decision”. Tr. p. 147 ln. 14 – p. 164 ln. 14.

k. Modify Section 20.1.6.104(1) by striking “and 15 copies” and adding “along with up to 15 copies, provided that the commission administrator may waive the requirement to provide up to 15 copies if an electronic copy of the original is provided in

a format acceptable for distribution to the commission members.” Tr. p. 105 ln. 2 - p.106, ln. 3; Tr. p. 164 ln. 15 – p. 174 ln. 15; and Tr. p. 179 ln. 5 – p. 180 ln. 25.

46. The Commission finds that the public interest will be served by the adoption of the Rule, with the changes described herein.


47. The Commission finds that the factors specified by NMSA 1978, Section 74-6-4(E) all weigh in favor of adopting the Rule with the changes described herein.

48. The Commission finds that the notice and hearing requirements of NMSA 1978, Section 74-6-6 and the Guidelines were satisfied in this rulemaking process.

49. The Rule as proposed by the Department in its Petition, and as modified herein, is adopted for any and all the reasons stated above.

## II. ORDER

By majority vote of a quorum of the Commission members, the proposed rule, as contained in the Department's petition and as modified herein, was adopted by the Commission on November 15, 2016.

  
Larry J. Dominguez, Commission Chair  
Water Quality Control Commission

Dated: 3/3/17

**CERTIFICATE OF SERVICE**

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I hereby certify that a copy of the **Order and Statement of Reasons** was sent via the stated methods below to the following party on March 6, 2017:

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